



RULE-MAKING ORDER

R-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Department of Early Learning

☐ Permanent Rule
☒ Emergency Rule

Effective date of rule:

Permanent Rules

☐ 31 days after filing.
☐ Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

☒ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose:

The purpose of this rule is to allow the new Department of Early Learning to continue performing background clearances on and providing due process hearing procedures to child care providers after the department separated from the Department of Social and Health Services and became a new department on July 1, 2006. No rules are being appealed or amended, but obsolete DSHS rules about background checks and hearings are being replicated in new WAC Title 170, which is the new Department of Early Learning title. This is an extension to allow for more public comment.

Citation of existing rules affected by this order:

Repealed: None Amended: None Suspended: None

Statutory authority for adoption: Chapter 265, Laws of 2006, Section 301

Other authority : Chapter 265, Laws of 2006

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR _____ on _____ (date)
Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
Address: _____ fax () _____ e-mail _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- ☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- ☒ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: SSHB 2964 (chapter 265, Laws of 2006) created the new Department of Early Learning, effective July 1, 2006. The department had existed as Division of Child Care & Early Learning, a part of DSHS. One function of the department is to perform background checks on applicants for child care licenses and workers in child care. Another function is to process administrative hearings when an applicant for a child care license is denied the license or denied clearance to work with children. With the creation of the Department of Early Learning, child care background check and hearing rules Title 388 WAC became obsolete for the purpose of regulating child care. These new rules are needed to allow the new Department of Early Learning to continue performing background checks and conducting hearings. This is vital to the health and safety of children in care. These rules are necessary to implement the Legislature intent in SSHB 2964. This extension is required to gather meaningful public input.

Date adopted:

10/24/06

NAME (TYPE OR PRINT)

Jone Bosworth

SIGNATURE

Jone M Bosworth

TITLE

Director, Dept of Early Learning

CODE REVISER USE ONLY

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(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	<u>72</u>	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted in the agency's own initiative:

New	___	Amended	___	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	___	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	<u>72</u>	Amended	___	Repealed	___

DEL Hearing Rules

I. GENERAL PROVISIONS

170-03-0010 Purpose and Scope

(1) **Application.** This chapter, WAC 170-03, contains the procedural rules that apply to adjudicative proceedings involving the Department of Early Learning (DEL) and

- Individuals or entities who are applicants for child care licenses or who are licensees of DEL and are adversely affected by a decision of DEL;
- Applicants for employment or employees of licensed child care agencies, child care providers, staff, volunteers, contracted providers, or other individuals who are required to meet background check standards before being authorized to care for or have unsupervised access to children in child care and who are disqualified by DEL;

Individuals receiving child care subsidies or on whose behalf child care subsidies are paid under the Seasonal Child Care program who are assessed an overpayment and who dispute the overpayment.

(2) **Relation to statutes and rules.** The rules of this chapter are intended to supplement RCW 43.20A.205 and its DEL successor, the statute governing hearing rights for licensees, Laws of 2006, ch. 265 § 311, the Administrative Procedure Act (APA), chapter 34.05 RCW, and the model rules, chapter 10-08 WAC, adopted by the office of administrative hearings (OAH). If a provision of this chapter conflicts with a provision in any chapter containing a substantive rule, the provision in the chapter containing the substantive rule governs.

(3) **Relation to actions and rules of other agencies.** Actions of DEL sometimes rely in part on actions taken by other agencies, most notably the department of social and health services (DSHS), or are taken in conjunction with the actions of other agencies. For example, DSHS's division of licensed resources/child protective services (DLR/CPS) has statutory responsibility for investigating allegations of child abuse or neglect in licensed child care agencies. If DLR/CPS finds child abuse or neglect occurred in a child care facility, the person who is the subject of the finding will have a right to a hearing to challenge that finding under DSHS rules. If the subject is a licensed provider, the child care license may be revoked as a result of the circumstances and finding and the provider also would have a right to a hearing under DEL hearing rules. To the extent the child abuse or neglect case and the licensing case can be consolidated or combined in one hearing, they should be combined.

(4) **Application and Amendments.** This chapter and any amendment to this chapter

applies to cases pending at the time of the adoption of the rule or amendment, unless the amendment or rule-making order specifically states that it does not apply to pending cases. An amendment to this chapter does not require that anything already done be redone in order to comply with the amendment, unless the amendment expressly says so.

Effective date: This chapter is effective July 3, 2006. In addition to cases arising on or after the effective date, this chapter applies to all pending DEL cases that have not to a full hearing before an ALJ by July 3, 2006, and to cases in which an initial decision is subject to review, but in which a petition for review has not been filed by July 3, 2006. This chapter does not apply to cases in which the hearing was held or begun prior to July 3, 2006, and/or which are awaiting initial decisions; *Provided*, Parts VIII and IX of this chapter, governing review of initial decisions, will apply to review of any initial decision mailed after the effective date of this chapter.

[Statutory Authority: RCW 34.05.220, Laws of 2006, ch. 265.]

170-03-0020 Definitions.

The following definitions apply to this chapter:

- (1) "**Administrative law judge (ALJ)**" means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not DEL employees or DEL representatives.
- (2) "**Business days**" means all days except Saturdays, Sundays and legal holidays.
- (3) "**Calendar days**" means all days including Saturdays, Sundays and legal holidays.
- (4) "**Case**" means the entire proceeding following the filing of a request for hearing with OAH.
- (5) "**Continuance**" means a change in the date or time of a prehearing conference, hearing or deadline for other action.
- (6) "**DEL**" or "**Department**" means the department of early learning.
- (7) "**Documents**" means papers, letters, writings, or other printed or written items.
- (8) "**Ex parte contact**" means a written or oral communication with a judge about something related to the hearing when the other parties are not present. Procedural questions are not considered an ex parte contact. Examples of procedural questions include clarifying the hearing date, time, or location or asking for directions to the hearing location.

- (9) **“Final order”** means an order that is the final DEL decision.
- (10) **“Good cause”** means a substantial reason or legal justification for failing to appear, to act, or respond to an action required under these rules.
- (11) **“Hearing”** means a proceeding before OAH that gives an aggrieved party an opportunity to be heard in disputes resulting from actions taken against the party by DEL. For purposes of this chapter, hearings include administrative hearings, adjudicative proceedings, and any other similar term referenced under chapter 34.05 RCW, the Administrative Procedure Act, Title 170 of the Washington Administrative Code, chapter 10-08 WAC, or other law.
- (12) **“Initial decision”** is a decision made by an ALJ that may be reviewed by a Review Judge.
- (13) **“OAH”** means the office of administrative hearings.
- (14) **“Party”** means a person or entity to whom a DEL action is directed that has a right to be involved in the hearing process. DEL also is a party, but is referred to in this chapter as DEL or the Department.
- (15) **“Representative”** means the person selected by a party to represent that party in an administrative hearing. **“Lay representative”** means a person or advocate who is assisting a party in presenting that party’s case in administrative hearings. **“DEL representative”** means an employee of DEL, a DEL contractor, or an employee of the Office of the Attorney General authorized to represent DEL in an administrative hearing.
- (16) **“Record”** means the official documentation of the hearing process. The record includes tape recordings or transcripts, admitted exhibits, decisions, briefs, notices, orders, and other filed documents.
- (17) **“Review”** means the act of reviewing initial orders and making the final agency decision as provided by RCW 34.05.464.
- (18) **“Review Judge” or “DEL Review Judge”** means an attorney employed by DEL to act as the reviewing officer and who is authorized to review initial orders and to prepare and enter the final agency order.
- (19) **“Rule”** means a state regulation, including a licensing standard. Rules are found in the Washington Administrative Code (WAC).
- (20) **“Stay”** means an order temporarily halting the DEL decision or action.
- (21) **“Words of command”** such as “should,” “shall,” and “must” are words that impose a mandatory obligation on a participant in the hearing process. The words “may” or “will” are used when referring to a discretionary act to be taken by an ALJ or Review

Judge.

[Statutory Authority: RCW 34.05.220, Laws of 2006, ch. 265, sec. 311.]

170-03-0030 Computing time for meeting deadlines in the hearing process

(1) When counting days to find out when the time allowed or prescribed for an action under these rules or to meet a hearing deadline:

(a) Do not include the day of the action, notice, or order. For example, if a hearing decision is mailed on Tuesday and a party has twenty-one days from the date of mailing to request a review, count Wednesday as the first day.

(b) Count the last day of the period, unless the last day is a Saturday, Sunday or legal holiday, in which case the deadline is the next business day.

(2) For periods of seven days or less, count only business days. For example, if you have seven days to respond to a review request that was mailed to you on Friday, May 10, the response period ends on Tuesday, May 21.

(3) For periods over seven days, count every day, including Saturdays, Sundays, and legal holidays.

(4) The deadline ends at 5:00 p.m. on the last day.

II. HEARING RIGHTS AND REQUESTS

170-03-0040 The right to a hearing

(1) A person or entity has a right to a hearing only if a law or DEL rule expressly gives that right and a hearing is timely requested.

(2) A party has only a limited time to request a hearing. The deadline for the request is set by statute or DEL rule. In most cases, DEL will send a notice of adverse action or disqualification that gives specific information about how, where and when to request a hearing.

(3) A challenge to a DEL adverse action is heard in an administrative hearing by an Administrative Law Judge (ALJ) employed by the Office of Administrative Hearings (OAH). Not all actions of DEL may be challenged through the hearing.

(4) If a party requests a hearing, one will be scheduled.

(5) If DEL or the ALJ questions a party's right to a hearing, the ALJ decides whether the party has that right. The ALJ will decide either (a) there is no right to a hearing and dismiss the case, or (b) there is a right to a hearing and proceed with the hearing.

170-03-0050 Requesting a hearing

(1) A request for hearing must be made in writing. It can be made by the party requesting the hearing or the party's representative.

(2) The hearing request should include:

- (a) The requesting party's name, address, and telephone number;
- (b) A brief explanation of why the requesting party disagrees with the DEL action;
- (c) Any assistance, such as a foreign or sign language interpreter or accommodation for a disability, needed by the requesting party.
- (d) A copy of the notice from DEL stating the adverse action.

(3) The request should be filed with OAH and served on DEL.

170-03-0060 Filing the request for hearing

(1) Filing is the act of delivering documents to OAH at the location listed in WAC 170-03-0070.

(2) The date of filing is the date documents are actually received by OAH during office hours.

(3) A party may file documents with OAH by:

- (a) Personal service (hand delivery);
- (b) First class, registered, or certified mail;
- (c) Fax transmission, if the party also mails a copy of the document the same day;
- (d) Commercial delivery service; or
- (e) Legal messenger service.

(2) A party cannot file documents by email.

170-03-0070 Location of Office of Administrative Hearings

(1) The Office of Administrative Hearings (OAH) is open from 8:00 am to 5:00 p.m. Mondays through Friday, except legal holidays

(2) The address for the office of administrative hearings (OAH) is:

Office of Administrative Hearings
2420 Bristol Court SW, 1st Floor
P.O. Box 42488
Olympia WA 98504-2488
(360) 664-8717
(360) 664-8721 (fax)

Requests for hearing should be sent to the attention of Barb Cleveland, Executive Assistant.

170-03-0080 Service of notice and documents

(1) Service is the act of delivering a copy of documents to the opposing party. Service gives the opposing party notice of the request for hearing or other action. When a document is given to a party, that party is considered served with official notice of the contents of the document.

(2) A party may serve another party by:

- (a) Personal service (hand delivery);
- (b) First class, registered, or certified mail;
- (c) Fax, if the party also mails a copy of the document the same day;
- (d) Commercial delivery service; or
- (e) Legal messenger service.

(3) A party cannot serve documents by email.

(4) A party must serve all other parties or a party's representative, if the party is represented, whenever the party files a pleading (request for hearing), brief or other document with OAH or the Review Judge or when required by law.

(5) Service is complete when:

- (a) Personal service is made;
- (b) Mail is properly stamped, addressed and deposited in the United States mail;
- (c) Fax produces proof of transmission;
- (d) A parcel is delivered to a commercial delivery service with charges prepaid; or
- (e) A parcel is delivered to a legal messenger service with charges prepaid.

170-03-0090 Proof of service

A party may prove that an opposing party was served with documents by providing any of the following:

- (1) A sworn statement by the person who served the document;
- (2) The certified mail receipt signed by the recipient;
- (3) An affidavit or certificate of mailing;
- (4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package;
- (5) Proof of fax transmission; or
- (6) Acknowledgment by the party being served.

170-03-0100 Representation during the hearing process

- (1) The party requesting the hearing may represent himself or herself or may have another person, except a DEL employee, act as the representative.
- (2) The representative may be a friend, relative, community advocate, attorney, paralegal, or lay representative.
- (3) The representative should provide OAH and the other parties with the representative's name, address, and telephone number. If the representative is an attorney or lay representative, the representative must file a written notice of appearance in the action. If

the representative is not an attorney, the party must provide a written statement to DEL authorizing the release of information about the party to the representative.

(4) DEL may be represented by an employee of DEL, a DEL contractor, or an assistant attorney general.

III. INTERPRETER SERVICES

170-03-0110 The Right to an Interpreter in the Hearing Process

(1) If a party has limited English proficiency (LEP), OAH will provide an interpreter.

(2) If OAH is notified that a party is a limited English speaking person, all notices concerning hearings must:

- (a) Be written in the party's primary language; or
- (b) Include a statement, in the primary language, explaining the importance of the notice and informing the party how to get help in understanding the notice and responding to it.

170-03-0120 Definitions

The following definitions apply to rules relating to interpreter services.

(1) **"Hearing impaired person"** means a person who, because of a hearing or speech impairment, cannot readily speak, understand or communicate in spoken language.

(2) **"Limited English Proficient" (LEP)** includes limited English speaking persons or other persons unable to communicate in spoken English because of a hearing impairment.

(3) **"Limited English-Speaking (LES) Person"** means a person who, because of non-English speaking cultural background or disability, cannot readily speak or understand the English language.

170-03-0130 Interpreter Qualifications

(1) OAH must provide a qualified interpreter to assist any person who:

- (a) Has limited English proficiency; and
- (b) Is a party or witness in a hearing.

(2) OAH may hire or contract with persons to interpret at hearings.

(3) Relatives of any party and DEL employees may not be used as interpreters.

- (4) The ALJ must determine, at the beginning of the hearing, if an interpreter can accurately interpret all communication for the person requesting the service.
- (5) The parties or their representatives may question the interpreter's qualifications and ability to be impartial.
- (6) If at any time before or during the hearing the interpreter does not provide accurate and effective communication, the ALJ must provide another interpreter.

170-03-0140 Waiver of interpreter services

- (1) An eligible party may waive interpreter services.
- (2) A request for waiver must be made in writing or through a qualified interpreter on the record.
- (3) The ALJ must determine that the waiver has been knowingly and voluntarily made.
- (4) A waiver of interpreter services may be withdrawn at any time before or during the hearing.
- (5) A waiver of interpreter services at the hearing constitutes a waiver of a right to challenge any aspect of the hearing based on a lack of understanding resulting from an inability to understand or a lack of proficiency in the English language.

170-03-0150 Requirements that apply to the use of interpreters

- (1) Interpreters must:
 - (a) Use the interpretive mode that the parties, the limited English proficient or hearing impaired person, the interpreter and the ALJ consider the most accurate and effective;
 - (b) Interpret statements made by the parties and the ALJ;
 - (c) Not disclose information about the hearing without the written consent of the parties; and
 - (d) Not comment on the hearing or give legal advice.
- (2) The ALJ must allow enough time for all interpretations to be made and understood.
- (3) The ALJ may video tape a hearing and use it as the official transcript for hearings

involving a hearing impaired person.

170-03-0160 Requirements that apply to decisions involving limited English speaking parties

(1) When an interpreter is used at a hearing, the ALJ must explain that the decision will be written in English but that a party using an interpreter may contact the interpreter for an oral translation of the decision at no cost.

(2) Interpreters must provide a telephone number where they can be reached to the ALJ and to the LES party. This number must be included in any decision or order mailed to the parties.

(3) OAH or the Review Judge must mail a copy of a decision or order to the interpreter for use in oral translation.

IV. PREHEARING PROCEDURES

170-03-0170 Notice of hearing

(1) When a hearing is requested, OAH sends the parties a written notice of the hearing or prehearing conference.

(2) The notice of hearing or prehearing conference will include:

(a) The names of all parties who receive the notice and, if known, the names and addresses of their representatives;

(b) The name, mailing address, and telephone number of the ALJ, if known;

(c) The date, time, place, and nature of the hearing;

(d) The legal authority and jurisdiction for the hearing; and

(e) The date of the hearing request.

(3) OAH also will send information with the notice of hearing stating:

(a) If a party fails to attend or participate in a prehearing conference or a hearing, that party may lose the right to a hearing and the ALJ may enter an order of default or an order dismissing the case.

(b) If a party needs a qualified interpreter because the appealing party or any witness has limited English proficiency, OAH will provide an interpreter at no cost.

(c) If the hearing is to be held by telephone or in person, and how to request a change in the way it is held.

(d) How to indicate any special needs for a party or witness.

(e) How to contact OAH if a party has a safety concern.

170-03-0180 Prehearing conferences

(1) A prehearing conference is a formal meeting that may be conducted by an ALJ before a full hearing. A prehearing conference may not be conducted in some cases. In others, more than one prehearing conference may be necessary.

(2) Either the ALJ or a party may request a prehearing conference, but the ALJ decides whether to hold a prehearing conference. OAH sends notice of the time and date of the conference to all parties.

(3) An ALJ may conduct the conference in person, by telephone conference call, by electronic means, or in any other manner acceptable to the parties.

(4) Attendance of the parties and their representatives is mandatory. A party may lose the right to participate during the hearing if that party does not attend the prehearing conference.

(5) Additional prehearing conferences may be requested by the parties and/or set by the ALJ to address the procedural or other issues specific to the case.

170-03-0190 Purposes of prehearing conference

(1) The purposes of the prehearing conference are to clarify issues, set deadlines for the parties to exchange information regarding witnesses, and evidence and set the time for the hearing.

(2) During a prehearing conference the parties and the ALJ may:

(a) Simplify or clarify the issues to be decided during the hearing;

(b) Agree to the date, time and place of the hearing;

(c) Identify accommodation and safety issues:

(d) Agree to postpone the hearing;

(e) Allow the parties to make changes in their own documents, including the DEL notice of adverse action or the appealing party's hearing request;

(f) Agree to facts and documents to be entered during the hearing;

(g) Set a deadline for each party to file and serve the names and phone numbers of witnesses, and copies of all documents or other exhibits that will be presented at the hearing;

(h) Schedule additional prehearing conferences;

(i) Resolve the dispute;

(j) Consider granting a stay if authorized by law or DEL rule;

(k) Consider a motion for summary judgment or other motion; or

(l) Determine any other procedural issues raised by the parties.

170-03-0200 Prehearing Order

(1) After the conference ends, the ALJ will send a prehearing order describing:

(a) The decisions made or actions taken during the conference;

(b) Any changes to DEL's or other party's initial documents; and

(c) Any agreements reached.

(2) A party may object to the prehearing order by notifying the ALJ in writing within ten days after the mailing date of the order. The ALJ must issue a ruling on the objection.

(3) If no objection is made to the prehearing order, the order determines how the hearing is conducted, including whether the hearing will be in person or held by telephone conference or other means, unless the ALJ changes the order for good cause.

170-03-0210 Assignment and Challenge of Assignment of Administrative Law Judge

(1) OAH assigns an ALJ at least five business days before the hearing and discloses that assignment in writing to the parties. A party may ask which ALJ is assigned to the

hearing by calling or writing the OAH field office listed on the notice of hearing.

(2) A party may file a motion of prejudice against an ALJ under RCW 34.12.050 by:

(a) Sending a written motion of prejudice at least three business days before the hearing, and before the ALJ rules on a discretionary issue in the case.

(b) The motion of prejudice must include an affidavit or statement that a party does not believe that the ALJ can hear the case fairly.

(c) The party must send the request to the OAH field office where the ALJ works and send a copy of the request to all other parties or, if other parties are represented, to the representatives.

(3) The first timely request for a different ALJ is automatically granted. Any later request may be granted or denied by the chief ALJ or a designee.

(4) A party may also request that an ALJ or Review Judge be disqualified under RCW 34.05.425, for bias, prejudice, conflict of interest, or if one of the parties or a party's representative has an ex parte contact with the ALJ or Review Judge by:

(a) Sending a written petition for disqualification. A petition for disqualification is a written explanation to request assignment of a different ALJ or Review Judge. A party must promptly make the petition upon discovery of possible bias, conflict of interest or an ex parte contact.

(b) A party must send or deliver the petition to the judge assigned to the case and send a copy of the petition to all other parties or, if other parties are represented, to the representatives. The ALJ or Review Judge must decide whether to grant or deny the petition and must state the facts and reasons for the decision.

V. LAWS APPLIED IN ADMINISTRATIVE HEARINGS

170-03-0220 Rules an ALJ or Review Judge must apply when making a decision

(1) ALJs and the Review Judge must first apply the DEL rules adopted in the Washington Administrative Code.

(2) If no DEL rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and published appellate court decisions.

170-03-0230 Challenges to validity of DEL rules

(1) Neither an ALJ nor a Review Judge may decide that a DEL rule is invalid or unenforceable. Only a court may decide this issue.

(2) If the validity of a DEL rule is raised during the hearing, the ALJ or Review Judge may allow argument for later court review.

170-03-0240 Amendment to DEL Notice or Party's Request for Hearing

(1) The ALJ must allow DEL to amend (change) the notice of a DEL action before or during the hearing to match the evidence and facts.

(2) If DEL amends its notice, it must put the change in writing and give a copy to the ALJ and the other parties.

(3) The ALJ may allow an appealing party to amend a hearing request before or during the hearing to conform with an amended DEL notice.

(4) If there is an amendment to either the DEL notice or the appealing party's request for hearing, the ALJ must offer to continue or postpone the hearing to give the parties more time to prepare or present evidence or argument if there is a significant change from the earlier DEL notice or from the appealing party's request for hearing.

(5) If the ALJ grants a continuance, OAH must send, a new hearing notice at least seven business days before the new hearing date.

170-03-0250 Change of address

(1) A party must tell DEL and OAH, as soon as possible, when the party's mailing address or telephone number changes.

(2) If OAH and DEL are not notified of a change in a party's mailing address and either DEL or OAH continues to send notices and other important papers to the address stated in the file, the ALJ and DEL may assume that the documents were received.

170-03-0260 Continuances

(1) Any party may request a continuance either orally or in writing.

(2) Before contacting the ALJ to request a continuance, a party should contact the other parties, if possible, to find out if they will agree to a continuance.

(3) The party making the request for a continuance must let the ALJ know whether the other parties agree to the continuance.

(a) If the parties agree to a continuance, the ALJ will grant the request, unless the ALJ finds that good cause for a continuance does not exist.

(b) If the parties do not agree to a continuance, the ALJ will set a hearing to decide whether there is good cause to grant or deny the continuance.

(4) If a continuance is granted, OAH will send written notice of the changed time and date of the hearing.

170-03-0270 Order of dismissal

(1) An order of dismissal is an order sent by the ALJ to end the hearing. The order is made by agreement of the parties, or because the party who requested the hearing withdrew the request, failed to appear, or refused to participate.

(2) If a hearing is dismissed because the appealing party did not appear or refused to participate, the DEL decision stands.

(3) If the hearing is dismissed due to a written agreement between the parties, the parties must follow the agreement.

170-03-0280 Vacating an order of default or order of dismissal

(1) A party may ask the ALJ to vacate (set aside) an order of default or dismissal.

(a) A request to vacate an order must be filed with OAH within twenty-one calendar days after the date the order of default or dismissal was mailed. If no request is received within that deadline, the order becomes a final order.

(b) The request to vacate an order of default or dismissal must specify why the party believes there is good cause for the order to be vacated.

(2) OAH will schedule a hearing on the request to vacate the order.

(3) At the hearing, the ALJ will receive evidence and argument from the parties on whether there is good cause for an order of default to be vacated.

(4) The ALJ will vacate an order of dismissal and reinstate the hearing if the defaulted party shows good cause or if the DEL representative agrees to waive the deadline.

(5) An agreed order of dismissal may be vacated only upon proof that a party has violated a condition of the agreed order of dismissal.

170-03-0290 Stay of DEL action

(1) Except as set forth in WAC 170-03-0300, at any point in the proceeding before OAH or the Review Judge, the appealing party may request that an ALJ or Review Judge stay (stop) a DEL action until there is a decision entered by the ALJ or Review Judge.

(2) The ALJ shall not grant a stay unless the ALJ makes specific findings that the stay is in the public interest or is made for good cause. In finding good cause the ALJ must determine:

- (a) The party requesting the stay is likely to prevail in the hearing on the merits;
- (b) The party requesting the stay will suffer irreparable injury, if the stay is not granted; and
- (c) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances of the case.

170-030-0300 - Stay of summary suspension of child care license

(1) The department may immediately and summarily suspend a license issued under the Laws of 2006, ch. 265, when:

- (a) it finds that conditions in the licensed facility constitute an imminent danger to a child or children in care; or
- (b) the public health, safety, or welfare requires emergency action.

(2) A licensee who contests suspension of a license by the department may obtain a stay of the effectiveness of that order only as set forth in this section.

(3) The licensee may request a stay by including such a request in the request for hearing or in a subsequent motion. The request for stay must be accompanied by a statement of grounds justifying the stay and a description of evidence setting forth the factual basis upon which the request is based.

(4) Upon receipt of a request for a stay, the ALJ will schedule a hearing on the request. The hearing may be combined with a pre-hearing conference. If it appears that a hearing on the merits and issues of the case should be consolidated with the request for a stay, the ALJ may advance the hearing date on its own initiative or by request of the parties.

(4) The ALJ shall not grant a stay unless the ALJ makes specific findings that the stay is in the public interest or is made for good cause. In finding good cause, the ALJ must determine:

- (a) The licensee is likely to prevail in the hearing on the licensing action;
- (b) The licensee will suffer irreparable injury, if the stay is not granted; and
- (c) The threat to the public health, safety, or welfare inherent in the licensee's operation of a child care facility is not sufficiently serious to justify the suspension of the license.

(5) Economic hardship of itself shall be an insufficient reason for a stay of a suspension of a license.

(6) Unless otherwise stipulated by the parties, the ALJ, after granting or denying a request for a stay, will expedite the hearing and decision on the merits.

(7) The decision on the request for the stay is subject to review by the Review Judge at the request of either DEL or the licensee. The request for review must be filed not later than seven days following date the decision on the request for stay is mailed by OAH to the parties.

(8) A request for review by the Review Judge shall be promptly determined. The decision on the request for review by the Review Judge shall not be subject to judicial review.

VI. HEARINGS

170-03-0340 Conduct of Hearings

(1) Hearings may be held in person or by telephone conference or other electronic means.

(2) All parties, their representatives and witnesses may attend the hearing in person or by telephone conference or other electronic means at the discretion of the ALJ.

(3) Whether a hearing is held in person or by telephone conference, the parties have the right to see all documents, hear all testimony and question all witnesses.

(4) When a hearing is held by telephone or other electronic means, all documentary evidence must be filed and served in advance of the hearing.

(5) All hearings must be recorded.

170-03-0350 - Authority of the administrative law judge

(1) The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing, provided that the ALJ's authority shall be limited to determining whether the sanction imposed or action taken by the department was warranted and/or justified under the evidence presented during the hearing. The ALJ shall not have authority to substitute or impose an alternative sanction, remedy or action.

(2) As needed, the ALJ may:

- (a) Administer oaths and affirmations;
- (b) Determine the order for presenting evidence;
- (c) Issue subpoenas and protective orders as provided in the Administrative

Procedures Act;

- (d) Rule on objections, motions, and other procedural matters;
- (e) Rule on motions for summary judgment;
- (f) Rule on offers of proof and receive relevant evidence;
- (g) Pursuant to RCW 34.05.449(5), close parts of a hearing to public observation or order the exclusion of witnesses upon a showing of good cause;
- (h) Question witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the matter;
- (i) Request additional exhibits and/or testimony following a finding that the additional evidence is necessary to complete the record provided all parties are given a full opportunity for cross-examination and/or rebuttal;
- (j) Take official notice of facts pursuant to RCW 34.05.452(5);
- (k) Regulate the course of the hearing and take any appropriate action necessary to maintain order during the hearing;
- (l) Permit or require oral argument or briefs and determine the time limits for submission thereof;
- (m) Issue an order of default pursuant to RCW 34.05.440;
- (n) Hold prehearing conferences;
- (o) Allow a party to waive rights given by chapters 34.05 RCW or these rules unless another law prevents it;
- (p) Decide whether a party has a right to a hearing;
- (q) Permit and regulate the taking of discovery;
- (r) Consider granting a stay if authorized by law or DEL rule; and
- (s) Take any other action necessary and authorized by any applicable statute or rule.

(3) The ALJ may, upon his or her own motion or the motion of any party, order that multiple administrative proceedings be consolidated for hearing if they involve common issues or parties.

(4) The ALJ may waive any of the department's procedural rules, other than a rule relating to jurisdiction, for any party not represented by legal counsel or a lay representative upon specific findings that (a) the waiver is necessary to avoid manifest injustice to the unrepresented party, and (b) that the waiver would not prejudice any other party.

(5) The ALJ shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

170-03-0360 Order of the hearing

- (1) At the hearing, the ALJ:
 - (a) Explains the rights of the parties;
 - (b) Marks and admits or rejects exhibits;

- (c) Ensures that a record is made;
 - (d) Explains that a decision is mailed after the hearing; and
 - (e) Notifies the parties of appeal rights.
- (2) The parties may:
- (a) Make opening statements to explain the issues;
 - (b) Offer evidence to prove their positions, including oral or written statements of witnesses;
 - (c) Question the witnesses presented by the other parties; and
 - (d) Give closing arguments about what the evidence shows and what laws apply.
- (3) At the end of the hearing if the ALJ does not allow more time to send in evidence, the record is closed.

170-03-0390 Evidence

- (1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.
- (2) Evidence may be all or parts of original documents or copies of the originals.
- (3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.
- (4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.
- (5) The ALJ may only consider admitted evidence to decide a case.

170-03-0400 Introduction of evidence into the record

- (1) The ALJ may set a deadline before the hearing for the parties to provide proposed exhibits and names of witnesses to the ALJ and to all other parties. If the parties miss the deadline, the ALJ may refuse to admit the evidence unless the parties show (a) they have good cause for missing the deadline; or (b) the other parties agree to waive the deadline.
- (2) The ALJ may admit and consider hearsay evidence. Hearsay is a statement made outside of the hearing used to prove the truth of what is in the statement. The ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it.
- (3) The ALJ may reject evidence, if it:
- (a) Is not relevant;

- (b) Repeats evidence already admitted;
- (c) Is from a privileged communication protected by law; or
- (d) Is otherwise legally improper.

(4) Except in cases where the department's notice of adverse action alleges the person lacks the character to provide for the needs of any child in care or to have unsupervised access to any child in care, evidence regarding character or reputation shall not be admissible. In cases where such evidence is admissible, the ALJ shall exercise reasonable control over the number of character witnesses so as to avoid duplication of testimony and evidence and needless consumption of time.

170-03-0410 Objections to evidence

(1) Although a party may offer any documents and testimony at the hearing to support the party's position, other parties may object to the evidence and may question the witnesses. For example, a party may object to the authenticity or admissibility of any exhibit, or offer argument about how much weight the ALJ should give the exhibit.

(2) The ALJ determines whether to admit the evidence what weight (importance) to give it.

(3) If the ALJ does not admit the evidence the party may make an offer of proof to show why the ALJ should admit it. The offer of proof preserves the issue for appeal. To make an offer of proof a party presents evidence and argument on the record to show why the ALJ should consider the evidence.

(4) If a witness refuses to answer any question ruled proper by the ALJ, the ALJ has discretion to strike all testimony previously given by that witness on the proceeding.

170-03-0420 Stipulations

(1) A stipulation is an agreement among two or more parties that certain facts or evidence is correct or authentic.

(2) If an ALJ accepts a stipulation, the ALJ must enter it into the record.

170-03-0430 Exhibits

(1) Proposed exhibits are documents or other objects that a party wants the ALJ to consider when reaching a decision. After the document or object is accepted by the ALJ, it is admitted and becomes an exhibit.

(2) The ALJ may require the parties to mark and number their proposed exhibits before the hearing and to provide copies to the other parties as far ahead of the hearing as possible.

(3) The ALJ admits proposed exhibits into the record by marking, listing, identifying, and admitting the proposed exhibits.

(4) The ALJ may also exclude proposed exhibits from the record.

170-03-0440 Judicial notice

(1) Judicial notice is evidence that includes facts or standards that are generally recognized and accepted by judges, government agencies, or national associations, such as a calendar, building code or standard of practice.

(2) An ALJ may consider and admit evidence by taking judicial notice.

(3) If a party requests judicial notice, or if the ALJ intends to take judicial notice, the ALJ may ask the party to provide a copy of the document that contains the information.

(4) The ALJ must give the parties time to object to judicial notice evidence.

170-03-0450 Witnesses

(1) A witness is any person who makes statements or gives testimony that becomes evidence in a hearing.

(2) One type of witness is an expert witness. An expert witness is qualified by knowledge, experience, and education to give opinions or evidence in a specialized area.

(3) Witnesses may include:

- (a) The appealing party or a DEL representative;
- (b) Anyone a party or the ALJ asks to be a witness.

(4) The ALJ decides who may testify as a witness.

(5) Unless DEL agrees, a current or former DEL employee may not be an expert witness against DEL if that employee was actively involved in the case while working for DEL.

170-03-0460 Requiring witnesses to testify or provide documents

(1) A party may require witnesses to testify or provide documents by issuing a subpoena. A subpoena is an order to appear at a certain time and place to give testimony, or to provide books, documents, or other items.

(2) ALJs, DEL, and attorneys for the parties may prepare subpoenas.

(3) If a party is not represented by an attorney, the party may ask the ALJ to prepare a subpoena on that party's behalf.

(a) The ALJ may schedule a hearing to decide whether to issue a subpoena.

(b) There is no cost to prepare a subpoena, but a party may have to pay for

(i) Serving a subpoena;

(ii) complying with a subpoena; and

(iii) witness fees according to RCW 34.05.446(7).

(4) A party may request that an ALJ quash (set aside) or change the subpoena at any time before the deadline given in the subpoena.

(5) An ALJ may set aside or change a subpoena if it is unreasonable.

170-03-0470 Serving a subpoena

(1) Any person who is at least eighteen years old and not a party to the hearing may serve a subpoena.

(2) Service of a subpoena is complete when the server:

(a) Gives the witness a copy of the subpoena; or

(b) Leaves a copy at the residence of the witness with a person over the age of eighteen.

(3) To prove that a subpoena was served on a witness, the person serving the subpoena must sign a written, dated statement including:

(a) Who was served with the subpoena;

(b) When the subpoena was served;

(c) Where the subpoena was served; and

(d) The name, age, and address of the person who served the subpoena.

170-03-0480 Testimony

(1) Direct examination. All witnesses may be asked questions by the party that calls the witness to testify. Each witness:

(a) Must affirm or take an oath to testify truthfully during the hearing;

(b) May testify in person or by telephone;

(c) May request interpreters from OAH at no cost to the parties;

- (d) May be subpoenaed and ordered to appear according to WAC 170-03-0460.
- (2) Cross examination. The parties have the right to cross-examine (question) each witness called by any other party.
- (3) If a party has a representative, only the representative, and not the party, may question the witness.
- (4) The ALJ may also question witnesses.

170-03-0490 Burden of proof

- (1) The party who has the burden of proof is the party who has the responsibility to provide evidence to persuade the ALJ that a position is correct under the standard of proof required.
- (2) Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.
- (3) The ALJ decides if a party has met the burden of proof.

170-03-0500 Equitable estoppel

- (1) Equitable estoppel is a legal doctrine defined in case law that may prevent DEL from taking some action against a party in a proceeding to challenge an overpayment notice issued by DEL.
- (2) There are five elements of equitable estoppel that must be proved by clear and convincing evidence. All of the following elements must be proved:
 - (a) DEL made a statement or took action or failed to take action, which is inconsistent with its later claim or position regarding an overpayment.
 - (b) The appealing party relied on DEL's original statement, action or failure to act.
 - (c) The appealing party will be injured if DEL is allowed to contradict the original statement, action or failure to act.
 - (d) Equitable estoppel is needed to prevent a manifest injustice.
 - (e) The exercise of government functions is not impaired.
- (3) If the ALJ concludes that all of the elements of equitable estoppel in subsection (2) of this section have been proved with clear and convincing evidence, DEL is stopped or prevented from taking action or enforcing its claim for repayment of the overpayment.

170-03-0510 Closing the record

When the record is closed, no more evidence may be taken, without a showing of good cause. The record is closed:

- (1) At the end of the hearing if the ALJ does not allow more time to send in evidence or argument; or
- (2) After the deadline for sending in evidence or argument is over.

VII. INITIAL DECISION

170-03-0520 Timing of the ALJ's decision

- (1) After the record is closed, the ALJ must write a hearing decision and send copies to the parties.
- (2) The maximum time an ALJ has to send a decision is ninety calendar days after the record is closed.

170-03-0530 Contents of the initial decision

The ALJ initial decision must:

- (1) Identify the hearing decision as a DEL case;
- (2) List the name and docket number of the case and the names of all parties and representatives;
- (3) Find the specific facts determined to exist by the ALJ, based on the hearing record, and relied on by the ALJ in resolving the dispute;
- (4) Explain why evidence is credible when the facts or conduct of a witness is in question;
- (5) State the law that applies to the dispute;
- (6) Apply the law to the facts of the case in the conclusions of law;
- (7) Discuss the reasons for the decision based on the facts and the law;
- (8) State the result;
- (9) Explain how to request changes in the decision and the deadlines for requesting them;

(10) State the date the decision becomes final; and

(11) Include any other information required by law or DEL program rules.

170-03-0540 Finality of initial decision

If no one requests review of the initial order or if a review request is dismissed, the initial decision becomes the final decision of DEL twenty-one calendar days after the date it is mailed to the parties by OAH.

170-03-0550 Challenges to the initial decision

(1) If a party disagrees with an ALJ's initial decision because of a clerical error, the party may ask for a corrected decision from the ALJ as provided in WAC 170-03-0560.

(2) If a party disagrees with the reasoning and result of an initial decision and wants it changed, the party must request review by the Review Judge as provided in WAC 170-03-0570 through 170-03-0.

170-03-0560 Correcting clerical errors in ALJ's decisions

(1) A clerical error is a mistake that does not change the result or intent of the decision. Some examples of clerical error are:

- (a) Missing or incorrect words or numbers;
- (b) Dates inconsistent with the decision or evidence in the record such as using May 3, 1989, instead of May 3, 1998; or
- (c) Math errors when adding the total of an overpayment.

(2) A party may ask for a corrected ALJ decision by making the request in writing and sending it to the OAH office that held the hearing. A copy of the request must be sent to the other parties or their representatives.

(3) A request to correct a clerical error must be made within ten days of the date the decision was mailed to the parties by OAH.

(4) When asking for a corrected decision, a party must clearly identify the clerical error.

(5) When a party requests a corrected initial or final order, the ALJ must either:

- (a) Send all parties a corrected order; or
- (b) Deny the request within three business days of receiving it.

(6) If the ALJ corrects an initial order and a party does not request review, the corrected

initial order becomes final twenty-one calendar days after the original initial order was mailed.

(7) Requesting a corrected initial order for a case does not extend the deadline to request review of the initial decision by the Review Judge.

If a party wants to stay the DEL action until review of the initial order is completed, the party must request a stay from the Review Judge.

VIII. REVIEW

170-03-0570 Appeal of the initial decision

(1) Review or appeal of the initial decision may occur when a party disagrees or wants a change in an initial order, other than correcting a clerical error.

(2) A party must request review of an initial order from the DEL Review Judge as provided in WAC 170-03-0580 through 170-03-0640.

(3) If more than one party requests review, each request must meet the deadlines in WAC 170-03-0580.

(4) The Review Judge considers the request, the initial order, and record, before deciding if the initial order may be changed.

(5) Review does not include another hearing by the DEL Review Judge.

170-03-0580 Time for requesting review

(1) The Review Judge must receive the written petition for review on or before the twenty-first calendar day after the initial order was mailed.

(2) A Review Judge may extend the deadline if a party both (a) asks for more time before the deadline expires and (b) shows good cause for requesting more time.

(3) A Review Judge may accept a review request after the twenty-one calendar day deadline only if:

(a) The Review Judge receives the review request on or before the thirtieth calendar day after the deadline; and

(b) A party shows good cause for missing the deadline.

(4) Good cause means a substantial reason or legal justification for failing to appear, to act, or respond to an action required under these rules.

170-03-0590 Petition for review

- (1) A party must make the review request (petition for review) in writing and clearly identify the:
 - (a) Parts of the initial order with which the party disagrees; and
 - (b) Evidence supporting the party's position.
- (2) The petition for review must be filed with the Review Judge and a copy sent to the other parties and their representatives.
- (3) The Review Judge can be contacted at the following address or at the address stated on the letter containing instructions for obtaining review mailed with the initial decision:

Review Judge
Department of Early Learning
P.O. Box 45480
Olympia, WA 98504-5480
(360) 725-4665
- (4) After receiving a party's review request, the Review Judge will send a copy to the other parties, their representatives and OAH.

170-03-0600 Response to Petition for Review

- (1) A party does not have to respond to the review request. A response is optional.
- (2) If a party responds, that party must send the response so that Review Judge receives it on or before the seventh business day after the date a copy of the petition for review was mailed to the party by the Review Judge.
- (3) The responding party must send a copy of the response to any other party or representative.
- (4) If a party needs more time to respond, the party must contact the Review Judge by the deadline in subsection (2) of this section and give a good reason.
- (5) A Review Judge may accept and consider a party's response even if it is received after the deadline.

170-03-0610 Decision process

- (1) After the response deadline, the record on review is closed unless there is a good reason to keep it open.

- (2) A Review Judge is assigned to the review after the record is closed.
- (3) The Review Judge only considers evidence given at the original hearing.
- (4) The Review Judge will decide the appeal without oral argument, unless the Review Judge determines that oral argument is necessary for resolution of the appeal.
- (5) The Review Judge enters a final order that affirms, changes, dismisses or reverses the initial order, or remands (returns) the case to OAH for further specified action.

170-03-0620 Authority of the Review Judge

- (1) The Review Judge has the same decision-making authority as an ALJ, but must consider the ALJ's opportunity to observe the witnesses.
- (2) The Review Judge's decision is the final decision of the agency in the case.

IX. REVIEW OF THE FINAL DECISION

170-03-0630 Request for reconsideration

- (1) If a party disagrees with the final decision issued by a Review Judge and wants it reconsidered, the party may ask the Review Judge to reconsider the decision because the party believes the Review Judge made a mistake.
- (2) If a party asks for reconsideration of the final decision, the reconsideration process must be completed before judicial review is sought.
- (3) A request for reconsideration must be made in writing and must clearly state the reasons why the party wants the final decision reconsidered.
- (4) The Review Judge must receive the written reconsideration request on or before the tenth calendar day after the final decision was mailed by the Review Judge to the parties. The party requesting reconsideration must send a copy of the request to all parties or, if the parties are represented, to their representatives.
- (5) If a reconsideration request is received by the Review Judge after the deadline, the final decision will not be reconsidered. However, the Review Judge may extend its deadline if a party (a) asks for more time before the deadline expires and (b) gives a good reason for the extension.

(6) After receiving a reconsideration request, the Review Judge will send a copy to the other parties and representatives giving them time to respond.

(7) If a party does not request reconsideration or ask for an extension within the deadline, the final order may not be reconsidered and it becomes the final agency decision.

170-03-0630 Response to a request for reconsideration

(1) A party does not have to respond to a request. A response is optional.

(2) If a party responds, that party must send a response to the Review Judge by or before the seventh business day after the date OAH or Review Judge mailed the request to the party.

(3) A party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, OAH or Review Judge may extend its deadline if the party gives a good reason within the deadline in subsection (2) of this section.

170-03-0640 Ruling on Request for Reconsideration

(1) After the Review Judge receives a reconsideration request, within twenty calendar days the Review Judge must either (a) write a reconsideration decision or (b) send all parties an order denying the request.

(2) If the Review Judge does not send a reconsideration decision or an order denying the request within twenty days of receipt of the reconsideration request, the request is denied.

(3) The Review Judge decision is final when the reconsideration decision is mailed or the date the reconsideration request is denied.

170-03-0650 Judicial review

(1) Judicial review is the process of appealing a final order to a court.

(2) Any party, except DEL, may appeal a final order by filing a written petition for judicial review that meets the requirements of RCW 34.05.546. The petition must be properly filed and served within 30 calendar days of the date OAH or the Review Judge mails the final decision in the case.

(3) RCW 34.05.510 to 34.05.598 contains further details of the judicial review process.